

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

LINDA ELAINE MATTA,	)	
	)	No. CV-09-3030-CI
Plaintiff,	)	
	)	ORDER GRANTING PLAINTIFF'S
v.	)	MOTION FOR SUMMARY JUDGMENT
	)	AND REMANDING FOR AN
MICHAEL J. ASTRUE,	)	IMMEDIATE AWARD OF BENEFITS
Commissioner of Social	)	
Security,	)	
	)	
Defendant.	)	
	)	
	)	
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BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 13, 15.) Attorney Thomas A. Bothwell represents Linda Matta (Plaintiff); Special Assistant United States Attorney Terrye E. Shea represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 6.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment, and remands the matter to the Commissioner for an immediate award of benefits.

**JURISDICTION**

On October 28 2003, Plaintiff applied for Disability Insurance benefits (DIB) and Social Security Income (SSI) benefits. (Tr. 61-63, 348-50.) Plaintiff alleged disability due to severe vertigo and hepatitis C, with an amended onset date of December 27, 2001, her

1 fiftieth birthday. (Tr. 81, 404.) Benefits were denied initially  
2 and on reconsideration. Plaintiff requested a hearing before an  
3 administrative law judge (ALJ), which was held before ALJ Richard  
4 Say on May 24, 2007. (Tr. 13, 398-418.) Plaintiff, who was  
5 represented by legal counsel, and vocational expert Dan McKinney  
6 (VE) testified. The ALJ denied benefits and the Appeals Council  
7 denied review. (Tr. 13-21, 6-8.) The instant matter is before this  
8 court pursuant to 42 U.S.C. § 405(g).

9 **STATEMENT OF THE CASE**

10 The facts of the case are set forth in detail in the transcript  
11 of proceedings, and are briefly summarized here. Plaintiff was 55  
12 years old at the time of the hearing. (Tr. 401.) She was widowed  
13 and lived in a house with her 19 year old son. (Tr. 404.)  
14 Plaintiff had a high school equivalency degree and had worked as a  
15 food server since 1987. (Tr. 82.) She testified she had always  
16 enjoyed her work, but no longer could carry trays and hot food  
17 safely due to her severe vertigo. (Tr. 406-07.) She reported she  
18 worked as a food server sporadically from 2003 to 2005, and in 2006  
19 and 2007, she worked some answering telephones and taking orders at  
20 the restaurant. (Tr. 407.) She stated she could not work full-time  
21 because of dizziness, liver swelling, fatigue and her need to lie  
22 down a lot. (Tr. 408.) Plaintiff testified she was told not to lift  
23 more than a gallon of milk, but she could sit without a problem,  
24 could walk a half hour to the store, and could stand for an hour  
25 before having to sit and tip her head to relieve pressure in her  
26 head. (Tr. 410.) She stated her vertigo caused problems with  
27 chronic nausea and vomiting, and she did not feel safe driving due  
28 to dizziness. (Tr. 410-412.)

**ADMINISTRATIVE DECISION**

The ALJ Say found Plaintiff met insured status requirements for DIB purposes through December 31, 2008. (Tr. 15.) At step one of the sequential evaluation, he found Plaintiff had not engaged in substantial gainful activity since the alleged onset date. (*Id.*) At step two, he found Plaintiff had severe impairments of left shoulder impingement post repair and balance disturbance. (Tr. 16.) He found Plaintiff was diagnosed with hepatitis C in late 2000, but it was asymptomatic and did not require treatment, and was therefore non-severe. (*Id.*) He also found her right shoulder injury, and diagnosed right shoulder "AC joint arthrosis with mild subacromial impingement syndrome," were a non-severe impairments. (*Id.*) At step three he found Plaintiff's impairments alone or in combination, did not meet or medically equal an administratively recognized level impairment listed in Appendix 1, Subpart P, Regulations No. 4 (Listings). (*Id.*)

The ALJ then found Plaintiff's statements concerning the severity of symptoms caused by her medical conditions were not entirely credible. (Tr. 18-19.) He determined she had the residual functional capacity (RFC) to perform less than the full range of light work and identified several non-exertional limitations. (Tr. 17.) Continuing the step four evaluation, and considering the evidence of record and VE testimony, the ALJ determined Plaintiff could still perform her work as a "waitress"; and, therefore, she was not under a disability through the date of his decision. (Tr. 19-22.)

**STANDARD OF REVIEW**

In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the

1 court set out the standard of review:

2 A district court's order upholding the Commissioner's  
3 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,  
4 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the  
5 Commissioner may be reversed only if it is not supported  
6 by substantial evidence or if it is based on legal error.  
7 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).  
8 Substantial evidence is defined as being more than a mere  
9 scintilla, but less than a preponderance. *Id.* at 1098.  
10 Put another way, substantial evidence is such relevant  
11 evidence as a reasonable mind might accept as adequate to  
12 support a conclusion. *Richardson v. Perales*, 402 U.S.  
13 389, 401 (1971). If the evidence is susceptible to more  
14 than one rational interpretation, the court may not  
15 substitute its judgment for that of the Commissioner.  
16 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner*, 169  
17 F.3d 595, 599 (9th Cir. 1999).

18 The ALJ is responsible for determining credibility,  
19 resolving conflicts in medical testimony, and resolving  
20 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th  
21 Cir. 1995). The ALJ's determinations of law are reviewed  
22 *de novo*, although deference is owed to a reasonable  
23 construction of the applicable statutes. *McNatt v. Apfel*,  
24 201 F.3d 1084, 1087 (9th Cir. 2000).

#### 25 SEQUENTIAL PROCESS

26 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the  
27 requirements necessary to establish disability:

28 Under the Social Security Act, individuals who are  
"under a disability" are eligible to receive benefits. 42  
U.S.C. § 423(a)(1)(D). A "disability" is defined as "any  
medically determinable physical or mental impairment"  
which prevents one from engaging "in any substantial  
gainful activity" and is expected to result in death or  
last "for a continuous period of not less than 12 months."  
42 U.S.C. § 423(d)(1)(A). Such an impairment must result  
from "anatomical, physiological, or psychological  
abnormalities which are demonstrable by medically  
acceptable clinical and laboratory diagnostic techniques."  
42 U.S.C. § 423(d)(3). The Act also provides that a  
claimant will be eligible for benefits only if his  
impairments "are of such severity that he is not only  
unable to do his previous work but cannot, considering his  
age, education and work experience, engage in any other  
kind of substantial gainful work which exists in the  
national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,  
the definition of disability consists of both medical and  
vocational components.

1 In evaluating whether a claimant suffers from a  
2 disability, an ALJ must apply a five-step sequential  
3 inquiry addressing both components of the definition,  
4 until a question is answered affirmatively or negatively  
5 in such a way that an ultimate determination can be made.  
6 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The  
7 claimant bears the burden of proving that [s]he is  
8 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.  
9 1999). This requires the presentation of "complete and  
10 detailed objective medical reports of h[is] condition from  
11 licensed medical professionals." *Id.* (citing 20 C.F.R. §§  
12 404.1512(a)-(b), 404.1513(d)).

13 It is the role of the trier of fact, not this court, to resolve  
14 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence  
15 supports more than one rational interpretation, the court may not  
16 substitute its judgment for that of the Commissioner. *Tackett*, 180  
17 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984).  
18 Nevertheless, a decision supported by substantial evidence will  
19 still be set aside if the proper legal standards were not applied in  
20 weighing the evidence and making the decision. *Browner v. Secretary*  
21 *of Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1988). If  
22 there is substantial evidence to support the administrative  
23 findings, or if there is conflicting evidence that will support a  
24 finding of either disability or non-disability, the finding of the  
25 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-  
26 1230 (9<sup>th</sup> Cir. 1987).

## 27 ISSUES

28 The question is whether the ALJ's decision is supported by  
substantial evidence and free of legal error. Plaintiff argues the  
ALJ erred when he (1) improperly rejected opinions from treating and  
examining doctors; (2) improperly rejected her testimony; and (3)  
found she could still perform her past relevant work as a food  
server. (Ct. Rec. 14 at 12.)

## DISCUSSION

### I. Credibility

The Commissioner's credibility determination must be supported by findings sufficiently specific to permit the court to conclude the ALJ did not arbitrarily discredit claimant's testimony. *Bunnell v. Sullivan*, 947 F.2d 341, 345-46 (9th Cir. 1991) (en banc). The ALJ may consider a claimant's reputation for truthfulness, inconsistencies either in testimony or between her testimony and conduct, her daily activities, work record, and testimony from physicians and third parties concerning the alleged symptoms. *Light v. Soc. Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997). If there is no affirmative evidence that the claimant is malingering, the ALJ must provide "clear and convincing" reasons for rejecting the claimant's testimony regarding the severity of symptoms. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998).

The ALJ engages in a two-step analysis in deciding whether to admit a claimant's subjective symptom testimony. *Smolen v. Chater*, 80 F.3d 1273, 1281 (9<sup>th</sup> Cir. 1996). Under the first step, the claimant must produce objective medical evidence of an underlying medically determinable impairment, and must show that the impairment, or a combination of impairments, "could reasonably be expected to produce pain or other symptoms." *Cotton v. Bowen*, 799 F.2d 1403, 1405 (9<sup>th</sup> Cir. 1986). Once the *Cotton* test is met, the ALJ must evaluate the credibility of the claimant. In addition to ordinary techniques of credibility evaluation, the ALJ may consider the following factors when weighing the claimant's credibility: the claimant's reputation for truthfulness, inconsistencies either in her allegations of limitations or between her statements and

1 conduct, daily activities and work record, and testimony from  
2 physicians and third parties concerning the nature, severity, and  
3 effect of the alleged symptoms. *Fair v. Bowen*, 885 F.2d 597 n.5 (9<sup>th</sup>  
4 Cir. 1989); *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir.  
5 1997). If the ALJ's credibility finding is supported by substantial  
6 evidence in the record, the court may not engage in second-guessing.  
7 *See Morgan*, 169 F.3d at 600; *Fair*, 885 F.2d at 604 ("Credibility  
8 determinations are the province of the ALJ."). However, an ALJ's  
9 failure to articulate "clear and convincing" reasons for rejecting  
10 Plaintiff's subjective complaints regarding the severity of his pain  
11 and limitations is reversible error. *Orn v. Astrue*, 495 F.3d 625,  
12 640 (9<sup>th</sup> Cir. 2007).

13 After summarizing Plaintiff's testimony, ALJ Say found her  
14 impairments could be expected to cause her alleged symptoms, but her  
15 statements were not entirely credible because: (1) there was nothing  
16 in the record indicating she was told not to lift more than a gallon  
17 of milk; (2) the medical evidence was inconsistent with her  
18 statement that she still has problems lifting her left arm; (3) in  
19 December 2003, she reported she could still do household chores,  
20 pull weeds and mow the lawn if her vertigo and nausea were not bad,  
21 but claimed no limitations due to her left shoulder/arm; and (4)  
22 there was no evidence in the medical record Plaintiff "needs a cane  
23 to ambulate." (Tr. 19.) An independent review of the record  
24 indicates the ALJ's credibility reasons are not "clear and  
25 convincing," or legitimate.

26 Plaintiff's 2003 function report is not inconsistent with her  
27 complaints or the medical record. She stated her primary impairment  
28 in October 2003 was vertigo. (Tr. 81, 88.) In December 2003, she

1 candidly reported she could occasionally lift twenty pounds, and she  
2 did her chores and yard work when her vertigo was not bad. She  
3 stated she could do dishes for 20 minutes and vacuum for a half  
4 hour, depending on her symptoms. She also reported she could cook  
5 when not nauseous, could do dishes leaning on the counter and vacuum  
6 depending on her balance. (Tr. 122.)

7       Discrediting Plaintiff's December 1, 2003, report because she  
8 did not list limitations in the use of her arms, is error.  
9 Plaintiff reported she fell on her left shoulder in 2004, and after  
10 the immediate pain improved, she began to experience significant  
11 pain in the summer of 2004, at which time she sought medical care.  
12 (Tr. 257, 264.) Imaging in July 2004 suggested an intra-substance  
13 tear which was surgically corrected in November 2004. (Tr. 268.)  
14 Therefore, it appears that at the time she completed the December  
15 2003 report, she had not yet injured her left shoulder, or sought  
16 treatment. The ALJ's reasons for discrediting Plaintiff's 2003  
17 report as inconsistent are not supported by substantial evidence.

18       It is also noted Plaintiff's self-reported limitations are not  
19 inconsistent with her December 2004 function report. (Tr. 147-54.)  
20 She again reported limitations in daily activities caused by vertigo  
21 and nausea, and noted she had problems with reaching and lifting  
22 because of surgery on her rotator cuff. (*Id.*) These earlier reports  
23 are consistent with her hearing testimony in which she reported  
24 difficulty in standing for more than an hour because of vertigo and  
25 vomiting, and a reluctance to drive because of dizziness. (Tr.  
26 409.) Her testimony that she was told not to lift more than a  
27 gallon of milk and is experiencing some pain from the past surgery  
28 and her recent right shoulder injury, is not unreasonable in light



1 of medical history and documentation of a recent injury to her right  
2 shoulder. It is noted on review that Plaintiff was seen in January  
3 2005, post left shoulder surgery, and instructed to continue working  
4 on range of motion and strengthening exercises. (Tr. 329.) In this  
5 case, where clinic notes establish ongoing care, the omission of one  
6 routine recommendation in clinic notes is not a "clear and  
7 convincing" reason to discredit a claimant's testimony.

8 Finally, the ALJ's finding regarding Plaintiff's need for cane  
9 misstates the evidence. The record shows in her December 2004  
10 Function report, Plaintiff reported she used a cane, but she did not  
11 state she needed one "to ambulate." (Tr. 153.) She specifically  
12 indicated that the cane was not prescribed by a doctor, and that she  
13 used it at the store and on "bad days" at home. (*Id.*) This  
14 explanation of her limited use of a cane for balance when one of her  
15 severe impairments is a "balance disturbance" is not a legitimate  
16 basis for impugning Plaintiff's credibility.

17 At the hearing, Plaintiff candidly stated she took care of her  
18 personal hygiene, cooked some for her son (who has spina bifida)  
19 and herself, and did dishes, but not daily. (Tr. 148, 410-11.)  
20 These activities are not inconsistent with an inability to perform  
21 light work. The court has held consistently that a claimant will  
22 not be penalized for trying to lead a normal life, and does not have  
23 to be "utterly incapacitated" to qualify for disability benefits.  
24 *Fair*, 885 F.2d at 603. The sporadic daily activities described by  
25 Plaintiff are not transferrable to a regular work environment and  
26 are not inconsistent with Plaintiff's claimed limitations. *Reddick*  
27 *v. Chater*, 157 F.3d at 722; *Cooper v. Bowen*, 815 F.2d 557, 561 (9<sup>th</sup>  
28 Cir. 1987). The ALJ's finding that Plaintiff's limited activities

1 of daily living are inconsistent with her subjective symptom  
2 complaints is not supported by the record.

3 The ALJ also reasoned Plaintiff's complaints are not supported  
4 by the medical evidence. Although medical evidence is a factor to  
5 consider in assessing credibility, without other "clear and  
6 convincing reasons," a lack of objective medical evidence to support  
7 severity is an insufficient reason for rejecting a claimant's  
8 testimony. *Bunnell*, 947 F.2d at 345-47; SSR 96-7p. Further, in  
9 this case, treating physicians and specialists who examined  
10 Plaintiff did not question her credibility, and opined the etiology  
11 of her symptoms was unknown. (See, e.g., Tr. 179, 184, 232, 236,  
12 247, 338, 341.) Plaintiff's self-reported symptoms are consistent  
13 with her established impairments and symptoms she reported to  
14 medical providers. Results of objective testing by Dr. Gates at the  
15 University of Washington Dizziness and Balance Center, showed a  
16 dysfunctional pattern of balance of unknown etiology. (Tr. 200-230.)  
17 Based on his examination and testing, Dr. Gates concluded she  
18 exhibited "nonvestibular dizziness and vomiting." (Tr. 230.)  
19 Although physicians suspected different etiology or were at a loss  
20 for etiology, the inability of the medical experts to agree on a  
21 diagnosis, or the origin of symptoms, does not reflect on  
22 Plaintiff's credibility.

23 The ALJ's findings that Plaintiff's statements are not entirely  
24 credible are not supported by "clear and convincing" reasons or the  
25 record. His failure to support his credibility determination with  
26 legally sufficient reasons is reversible error.

27 **II. Step Four - RFC Findings and Past Relevant Work**

28 At step four, the Commissioner makes RFC findings, and

determines if a claimant can perform past relevant work. Although the burden of proof lies with the claimant at step four, the ALJ still has a duty to make the requisite factual findings to support his conclusion. SSR 82-62. This is done by looking at the "residual functional capacity and the physical and mental demands" of the claimant's past relevant work. 20 C.F.R. §§ 404.1520(a)(4)(iv) and 416.920(a)(4)(iv).

At step four, the ALJ determined Plaintiff had the residual functional capacity (RFC) for less than a full range of light work with the following restrictions:

The claimant can lift 20 pounds occasionally and frequently lift or carry 10 pounds. The claimant can sit for two hours and stand or walk for six hours in an eight hour workday. The claimant can occasionally reach overhead with her left arm. The claimant can frequently stoop, crouch, crawl, kneel, balance, and climb stairs and ramps. She should never climb ladders, ropes or scaffolds. She should avoid heights and moving machinery. She should also avoid noisy environments. The claimant is afflicted with symptoms from various sources including mild to moderate chronic pain which of sufficient severity to be noticeable to her at all times, but she would be able to remain attentive and responsive to a work setting and could carry out normal work assignments satisfactorily. The claimant is also capable of performing sedentary work.

(Tr. 17.) Based on testimony from the VE, the ALJ found Plaintiff could still perform her past relevant work as a food server. (Tr. 20.)

#### **A. RFC Findings**

The RFC assessment is a description of a claimant's ability to perform work-related activities. It is based upon all relevant evidence in the record, including the claimant's own statement. SSR 96-5p. As discussed above, the ALJ erred in rejecting Plaintiff's testimony and her functional reports regarding limitations caused by

1 her medically determinable impairments. Because the ALJ improperly  
2 excluded limitations described by Plaintiff, the RFC determination  
3 is not complete. In addition, the ALJ's RFC findings are not  
4 supported by medical evidence.

5 The ALJ stated he gave limited weight to an agency RFC  
6 assessment dated July 5, 2005, and signed by non-examining agency  
7 physician Howard Platter, M.D. (Tr. 19.) The opinion of a non-  
8 examining physician cannot by itself constitute substantial evidence  
9 that justifies the rejection of the opinion of either an examining  
10 physician or a treating physician. *Lester v. Chater*, 81 F.3d 821,  
11 831 (9<sup>th</sup> Cir. 1995); *Pitzer v. Sullivan*, 908 F.2d 502, 506 n.4 (9<sup>th</sup>  
12 Cir. 1990) (conclusion of non-examining physician entitled to less  
13 weight than examining physician). Based on a review of medical  
14 records from 2004, Dr. Platter opined Plaintiff could perform medium  
15 work, with non-exertional limitations that are substantially the  
16 same as those in the ALJ's 2007 RFC. (Tr. 17, 273-74.) Dr.  
17 Platter's report, however, is not supported by the medical evidence  
18 in its entirety or Plaintiff's improperly rejected statements.  
19 Thus, Dr. Platter's report is not substantial evidence to support  
20 the ALJ's RFC finding that although Plaintiff cannot perform the  
21 medium level work assessed by Dr. Platter, she can "frequently,  
22 stoop, crouch, crawl, kneel, balance, and climb stairs and ramps,"  
23 that she has unlimited use of her right arm, and she can  
24 occasionally reach overhead with her left arm. (Tr. 273-75.)

25 At step four, the ALJ also erroneously rejected the opinions of  
26 Plaintiff's examining physician, Tarique Ahmed, M.D., who examined  
27 Plaintiff in May 2007. (Tr. 284-87.) "As is the case with the  
28 opinion of a treating physician, the Commissioner must provide

1 'clear and convincing' reasons for rejecting the uncontradicted  
2 opinion of an examining physician." *Lester*, 81 F.3d at 830. If the  
3 opinion is contradicted, it can only be rejected for specific and  
4 legitimate reasons that are supported by substantial evidence in the  
5 record. *Andrews*, 53 F.3d at 1043 (9<sup>th</sup> Cir. 1995). An examining  
6 physician's opinion based on independent clinical findings can  
7 constitute substantial evidence. *Magallanes v. Bowen*, 881 F.2d 747,  
8 751 (9<sup>th</sup> Cir. 1989).

9 The ALJ gave little weight to Dr. Ahmed's opinions because of  
10 a perceived inconsistency in the report, and because the exam was  
11 performed for state benefits. (Tr. 20.) Neither reason is legally  
12 sufficient. First, the ALJ reasoned that Dr. Ahmed, who examined  
13 Plaintiff in May 2007, opined Plaintiff was unable to work due to  
14 right shoulder pain, but then contradicted himself when he opined  
15 she could do sedentary work. (*Id.*) However, a review of the record  
16 shows no contradiction. Plaintiff's occupation has always been as  
17 a food server, which the VE testified is medium to light level work.  
18 (Tr. 414.) Thus, it is not contradictory for Dr. Ahmed to opine  
19 Plaintiff was unable to perform her work as a food server because of  
20 vertigo and "rt rotator cuff injury," but found her "overall work  
21 level" was sedentary. (Tr. 286.) Further, the ALJ's reasoning that  
22 Dr. Ahmed's evaluation warranted little weight because it was for  
23 state public assistance eligibility is not a legitimate reason.  
24 *Lester*, 81 F.3d at 832 (purpose for which evaluation obtained is not  
25 a legitimate basis for rejection). The ALJ's RFC findings are not  
26 supported by substantial evidence and are based on legal error.

27 **B. Past Relevant Work**

28 Past relevant work is work performed in the last 15 years,

1 lasted long enough to learn it and was substantial gainful  
2 employment. SSR 82-61. In finding that an individual has the  
3 capacity to perform a past relevant job at step four, the ALJ's  
4 decision must contain among the findings the following specific  
5 findings of fact:

6 1. A finding of fact as to the individual's residual  
7 functional capacity;

8 2. A finding of fact as to the physical and mental demands of  
9 the past job/occupation; and

10 3. A finding of fact that the individual's residual  
11 functional capacity would permit a return to his or her past job or  
12 occupation. SSR 82-62.

13 These findings must be based on the evidence in the record and  
14 must be developed and fully explained in the disability decision.  
15 Evidence of the physical and mental requirements of a particular job  
16 may be found in the *Dictionary of Occupational Titles (DICOT)*, other  
17 administratively recognized publications, or vocational expert  
18 testimony. SSR 82-61. Vocational experts are used most often at an  
19 ALJ hearing. SSR 00-4p. Step four requires specific findings on  
20 all three points sufficient "to insure that the claimant really can  
21 perform his past relevant work." *Pinto v. Massanari*, 249 F.3d 840,  
22 845 (9<sup>th</sup> Cir. 2001); see also SSR 00-40.

23 As discussed above, the ALJ's RFC assessment was erroneous.  
24 The ALJ presented the incomplete RFC discussed above in the form of  
25 a hypothetical question to the VE. (Tr. 414.) Because the VE's  
26 opinion was based on a hypothetical that did not include Plaintiff's  
27 improperly rejected limitations such as frequent vertigo/dizziness,  
28 vomiting, and nausea, and restrictions due to left and right

1 shoulder injury, or Dr. Ahmed's improperly rejected opinions, the  
2 ALJ's finding that she could still work on a regular and sustained  
3 basis as a food server is not supported by substantial evidence.  
4 *Bayliss v. Barnhart*, 427 F.3d 1211, 1217 (9<sup>th</sup> Cir. 2005).

5 In addition, the ALJ did not make the specific findings  
6 regarding the exertional and non-exertional requirements of  
7 Plaintiff's past work. The vocational expert simply referred to the  
8 *DICOT*, and noted Plaintiff testified her past work involved lifting  
9 and carrying 100 pounds, which she could no longer perform, but he  
10 found Plaintiff could perform the job as generally described by the  
11 *DICOT*. (Tr. 414.) This is reversible error. The regulations  
12 state that "[f]inding that a claimant has the capacity to do past  
13 relevant work on the basis of a generic occupational classification  
14 of the work is likely to be fallacious and unsupportable." SSR 82-  
15 61; see also *Pinto*, 249 F.3d at 845 (reliance on the *DICOT* alone was  
16 not sufficient basis for a finding that claimant can perform past  
17 relevant work). Further, the ALJ found Plaintiff should avoid noisy  
18 environments, and the *DICOT* rates the noise level for food server  
19 jobs as "moderate." *DICOT*, 4<sup>th</sup> ed., rev. 1991, 311.477-030  
20 (Waitress). There is no testimony or other evidence regarding what  
21 constitutes a "moderate" level of noise or what level is present in  
22 Plaintiff's past work as performed.

23 Although the VE testified, and counsel conceded, there were  
24 many unskilled light jobs in the economy that the hypothetical  
25 individual presented could perform, (Tr. 415-16 ), the hypothetical  
26 relied upon by the VE was incomplete; therefore, the ALJ erroneously  
27 relied on the VE opinions at step four. *Magallanes*, 881 F.2d at  
28 756. Because the ALJ's step four findings are not supported by

1 substantial evidence, that Commissioner did not meet his burden at  
2 step four to show Plaintiff could still perform her past work as a  
3 waitress.

4 **III. Remedy**

5 Where the Commissioner fails to provide adequate reasons for  
6 rejecting the opinion of a treating or examining physician, the  
7 opinion is credited "as a matter of law." Further, where a  
8 claimant's testimony is improperly rejected, and the claimant would  
9 be disabled if her statements were credited, remand for benefits is  
10 appropriate. *Orn v. Astrue*, 495 F.3d 625, (9<sup>th</sup> Cir. 2007); *Benecke*  
11 *v. Barnhart*, 379 F.3d 587, 595(9<sup>th</sup> Cir. 2004).

12 Here, the ALJ did not provide legally sufficient reasons for  
13 rejecting Plaintiff's testimony that her symptoms prevented her from  
14 working as a waitress, and Dr. Ahmed's opinion that Plaintiff's  
15 impairments limited her to sedentary work. The Medical Vocational-  
16 Guidelines direct a finding of "disabled" for an individual over 50  
17 who can perform only sedentary work. 20 C.F.R. Pt. 404, Subpart P,  
18 App. 2. (Tr. 416.) The record is clear that the ALJ would be  
19 required to find claimant disabled if the improperly rejected  
20 evidence is credited, and there are no outstanding issues to resolve  
21 in further proceedings. Because no useful purpose would be served  
22 by remand for additional proceedings, remand for an award of  
23 benefits is warranted. *Benecke*, 379 F.3d at 595; *Moisa v. Barnhart*,  
24 367 F.3d 882, 887 (9<sup>th</sup> Cir. 2004). Accordingly,

25 **IT IS ORDERED:**

26 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is  
27 **GRANTED** and the matter is remanded to the Commissioner for  
28 calculation and immediate award of benefits.



The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for **PLAINTIFF** and the file shall be **CLOSED**.

S/ CYNTHIA IMBROGNO  
UNITED STATES MAGISTRATE JUDGE